United States Court of Appeals

for the Second Circuit

EXHIBITS

75-4021

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL ASSOCIATION OF INDEPENDENT TELEVISION
PRODUCERS & DISTRIBUTORS, NO. 75-4021
WARNER BROTHERS et al., NO. 75-4024
SANDY FRANK PROGRAM SALES, INC., NO. 75-4025
WESTINGHOUSE BROADCASTING COMPANY, INC., NO. 75-4026
COLUMBIA BROADCASTING SYSTEM, INC., NO. 75-4036
Petitioners.

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents

AMERICAN BROADCASTING COMPANIES, INC.
COLUMBIA BROADCASTING SYSTEM, INC.
NATIONAL BROADCASTING COMPANY, INC.
WESTINGHOUSE BROADCASTING COMPANY, INC.
WARNER BROTHERS, INC., et al.
NATIONAL COMMITTEE OF INDEPENDENT
TELEVISION PRODUCERS, et al.
MOTION PICTURE ASSOCIATION OF AMERICA, INC.,
Intervenors.

EXHIBIT TO BRIEF FOR INTERVENOR NATIONAL BROADCASTING
COMPANY, INC., ON PETITIONS FOR REVIEW OF AN
ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

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March 3, 1975

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of

Consideration of the operation of, and possible changes in the Prime Time Access Rule, Section 73.658(k) of the Commission's Rules	)	Docket No. 19622

REPLY COMMENTS OF
NATIONAL BROADCASTING COMPANY, INC.

These reply comments are addressed to the claims of the major motion picture companies that the prime time access rule has benefited the television networks at the expense of the major motion picture companies.[1] The factual data demonstrating that these claims are erroneous are set forth below.

NBC has urged in its original comments that the Commission provide a measure of stability for the broadcasting industry which has now adapted to the rule. We do not restate these considerations but here address ourselves only to the contentions of the majors.

The major motion picture companies[2] are by far the largest suppliers of television programming. They supply

1. MCA Comments, pp. 12-14; Warner Brothers Comments, pp. 12-21.

2. MCA, 20th Century-Fox, Paramount, United Artists, Columbia, MGM and Warner Brothers.

from 65 to 70 percent of network prime time entertainment programs. The amount of prime time entertainment programming that they provide for network schedules has not declined since the prime time access rule became effective, notwithstanding the general cutback in network schedules effected by the rule. This is shown by the following table:

Network Prime Time Regularly
Scheduled Entertainment Programs
(Hours)

Fall Schedule	Supplied By Networks	Supplied by Major Movie Companies[1]
1970	4-1/2	39
1971	5	41
1972	5	39
1973	5	41-1/2
1974	4	39

These major producers favor outright repeal of the rule. The practical reason is obvious. They already are the principal suppliers of network prime time entertainment programming, and presumably they would be in an advantageous competitive position to supply much of the additional network

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1. Source: Annual *Variety* tabulation of network prime time series and producers. Theatrical feature films are supplied by the majors, and it has been assumed that 90-minute, made-for-TV movies on CBS and ABC are supplied by networks and majors, in the ratios of 40-60 percent on ABC and 50-50 percent on CBS (the ratios used in the Pearce Report, pp. 106-107). The table does not include ABC Monday Night Football, which is replaced starting in January by feature films largely supplied by the majors.

programming that they believe would flow from outright repeal of the rule.[1]

In support of their position, the majors are unable to argue that they should be preferred as suppliers of programming so they attack the network service and claim that the elimination of network prime time programs on a nationwide basis for twelve hours per week somehow increases network "dominance." First, they attribute to the rule an asserted increase in the position of the networks in the remaining prime time that they continue to program, measured in license fees they pay to producers and in the revenues per minute that they receive from advertisers. Second, they assert that network-owned stations determine the first-run syndicated programming that will be available to the public. Neither contention has merit.[2]

The Commission's Report and Order issued in February 1974 correctly found that the prime time access rule

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1. The major motion picture producers supply eight times as much entertainment programming for network prime time schedules as do the three networks themselves. See table, p. 2, supra. In addition to supplying network programming, the major studios also are among the largest, if not the largest, suppliers of syndicated programming throughout the country. ADL 1969 Report, Table 47, pp. 113-114. Their inventories and currently produced feature films provide consistently successful forms of entertainment programming, both for license to networks and directly to stations.

2. The same sort of contention is made in the report of Dr. Alan Pearce. As in the case of the majors, Dr. Pearce's report does not support these conclusions with either policy or the factual analyses.

reduced the position of the television networks in prime time television programming. The Commission did so in the context of the same regulatory approach it exercised when it adopted the prime time access rule in the first instance. Thus, the prime time access rule eliminated network decision making and selection on a nationwide program basis from a significant number of prime time hours each week. This would be true, to varying degrees, both under PTAR I and PTAR II. To the full extent of the reduction in network program schedules,[1] networks were eliminated entirely from any role in the development, production, and selection of programming. This reduction was, as the Commission found, "definite and readily apparent." (Report, Para. 97)[2]

The Commission's February Report and Order also correctly rejected the "increase in dominance" arguments of the majors as "speculative" (Report, Para. 97).[3] However, the

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1. See NBC Comments, pp. 6, 21. Westinghouse argues (Westinghouse Comments, p. 3) that PTAR II would "permit" more network prime time programming than was the pre-rule situation. Westinghouse was obviously comparing what the networks <u>did</u> program pre-rule with what they <u>could</u> program under PTAR II. A comparison of what the networks <u>could have</u> programmed pre-rule with what they <u>could</u> program under PTAR II shows a 2-1/2 to 3-hour reduction <u>per</u> network compared to pre-rule levels.

2. 29 RR 2d 643, 704 (1974).

3. <u>Ibid</u>.

Court of Appeals has asked the Commission to be more specific as to its conclusion. For this reason, and because the arguments have now been repeated, we will examine the arguments in somewhat more detail. As the following facts show, the premises advanced to support the argument are inaccurate and, at best, vastly overstate any consequence that may reasonably be attributed to the rule:

First, insofar as network program costs and revenues from advertisers are concerned, license fees for prime time network programs have paralleled the rate of inflation, as have prime time costs to network advertisers per thousand homes (CPM). This same general inflationary tendency also is apparent in daytime CPM as well. The rate of increase, both in network prime time and in daytime CPM costs for advertisers, has lagged behind the rate of increase in advertisers' expenditures on television generally.

Second, insofar as syndicated programming is concerned, purchases by network-owned stations are neither essential to success nor a guarantee of it. Many syndicated programs succeed without being carried by any network-owned station. In fact, there are numerous non-network-owned stations available to syndicators in these markets. Thus, in every market in which there is one or more network-owned

stations, there are at least three non-network-owned commercial television stations.

Third, insofar as program supply is concerned, and while the public will watch programming of its choice, the total entertainment schedules of the three networks combined represent only about 36 percent of the program choices available to the American public from commercial television stations in the top 50 markets. And within network schedules, only a very small percentage of network entertainment programming is produced by the networks themselves. In prime time, less than 10 percent of network entertainment programming is produced by the networks; more than 90 percent is supplied by independent producers. Thus, even confined to prime time and within prime time to the time period 7:00 to 11:00 p.m., less than two percent of the program choices available in the top 50 markets consists of entertainment programs produced by any network.[1]

We turn to a more detailed examination of the contentions and of the facts.

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1. Less than five percent consists of programs produced by the three networks combined.

A. Network Program License Fees and Advertisers' Rates

The assertion here by the major motion picture producers is that the prime time access rule has enhanced the position of the networks in their dealings with producers and with advertisers.[1] As to producers, the evidence cited is "Average Per Episode Revenues" for MCA's one-hour shows licensed to networks in the period 1970-1971 through 1973-1974. As to advertisers, the evidence cited is network revenues per commercial minute, 7:30 to 11:00 p.m., as reflected in Nielsen reports for November of each of the same seasons.[2] The basic complaint appears to be that revenues from advertisers are going up faster than license fees to producers.[3] In one grand leap, the results asserted are then

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1. MCA Comments, pp. 12-14; Warner Brothers Comments, pp. 18-20.

2. MCA Comments, p. 13.

3. The Warner Brothers Comments, p. 20, suggest that the trend in license fee payments has led to deficit financing by producers. Relevant to this point, however, is the implication in the Pearce Report that the major film companies may be inefficient in their television production operations (Pearce Report, pp. 100-101). Also, the data in that report, apparently supplied by the majors, states that $32,000 of the budget for a new one-hour episode goes to "general expenses" and $41,000 goes to "overhead," for a total of 29 percent of the total budget (Pearce Report, p. 112). Another accounting practice which may lead to the claimed deficits is the additional charge by the film companies, usually labelled as a "distribution fee," of 10 percent of the revenues received from a network.

stripped from the economic environment in which they occurred and attributed entirely to the workings of the prime time access rule.

Both branches of the argument are inaccurate and misleading, especially as to the magnitude of any relative benefits or detriments that may reasonably be attributed to the rule.

1. Producers' and License Fees

The MCA table is the only data submitted on revenues received by producers for network programs. This table relates only to one-hour shows, although MCA produces shows of other lengths as well.

In order to test the results asserted by MCA for its one-hour shows, NBC has examined the license fees that it has paid for all of the prime time, made-for-television entertainment series programs that NBC obtained from all outside producers, including MCA, for each full broadcast year from 1970-1971 through 1973-1974. NBC has taken its total expenditures for these programs and has divided the total each year by the number of hours of such programs in order to arrive at NBC's average hourly cost each year of made-for-television entertainment series programs.[1]

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1. Only specials, theatrical films and NBC-produced programs were excluded.

While, as the Commission appreciates, the actual dollar figures are confidential, the clear trend since the 1970-1971 broadcast year reflects a substantial increase in license fee payments. Thus, as shown in the table below, license fees have increased 19 percent since the 1970-1971 season.

NBC Per Hour Prime Time License Fees
All Made-For-Television Entertainment Series
(1970-1971 = 100)

	License Fee Index	% Change from Prior Year	% Change from 1970-1971
1970-71	100.0	--	--
1971-72	98.5	(1.5)	(1.5)
1972-73	110.5	12.1	10.5
1973-74	118.9	7.6	18.9

Further, this increase in license fees understates the full measure of the increased benefits to producers since the 1970-1971 broadcast season. It should be remembered that the rule prohibiting networks from acquiring financial interests and rights in non-network uses of programs, such as syndication, also became effective in this period. Formerly, networks were free to negotiate for a sharing of these rights and interests, and the license fees, in economic effect, represented payments both for the license and for syndication rights and interests on those occasions when they were obtained. However, since the rule became effective, networks have not been able to obtain

such rights and interests and license fees have represented only payments for network exhibition rights. The Commission's Report and Order of May 7, 1970, adopting the financial interest rule emphasized the value of these rights to producers.[1] One economist who has made an empirical study of the situation has quantified the value of syndication rights and profits at over $10,000 per new half-hour episode (based on 1960-1965 cost and price levels).[2] Hence, to the full extent that license fees formerly included an element of payment attributable to syndication rights and interests,[3] a comparison of pre-rule and post-rule license fees understates, perhaps to a substantial degree, the actual increase in payments received by producers.

In short, license fee dollars paid to producers by NBC have increased 19 percent since the rule. In economic terms, the gain is even greater because the networks obtain less value and the producers retain greater value in exchange

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1. See e.g., 18 RR 2d 1825, 1833-1834, para. 10 (1970).

2. Crandall, "FCC Regulation, Monopsony, and Network Television Program Costs," 3 Bell Journal of Economics and Management Science, 483, 499 (1972).

3. According to Dr. Crandall's analysis, the payments for these rights were "built into the networks' program payments." See Crandall, "Television Network Program 'Ownership,'" 14 Journal of Law and Economics, 385, 406 (1971).

for the license fee payment. By way of comparison, inflation in the economy generally has increased about 19 percent over the same period.[1] Thus, payments to producers have kept pace with and, indeed, may well have exceeded, the rate of inflation in the economy generally.

This increase in payments and benefits to producers, averaging, based on NBC's experience, 19 percent over three years in license fees alone, completely puts to rest the contention that the position of the networks in their dealings with producers has been enhanced either since, or because of, the adoption of the prime time access rule.

2. Advertisers and Revenues Per Minute

MCA cites data which show that the network prime time revenues per minute in the period 7:30 to 11:00 p.m. have increased from $50,000 to $68,000 from November 1970 to November 1973.[2] Citing the undeniable fact that the networks' prime time entertainment program schedules have been reduced by the prime time access rule, MCA and the other majors leap

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1. Based on the average of monthly consumer price indices for the 1970-1971 broadcast year compared with the average for the 1973-1974 broadcast year. Source: Survey of Current Business (Department of Commerce).

2. MCA Comments, p. 13; Warner Brothers Comments, p. 18. The source is Nielsen data.

to the conclusion that the prime time access rule is responsible for this increase, in its entirety, and that somehow the Commission's duty is to take remedial action. The majors are wrong on both counts.

Most importantly, it is well known that audience size and composition is of great significance in determining the price that an advertiser pays for broadcast of its commercial messages. Recognition of this basic fact, not considered at all by MCA, rules out MCA's simplistic approach.[1]

We believe that any knowledgeable person examining the "price"-per-minute data provided by MCA would attempt to test the MCA thesis by seeking the answers to a number of questions, none of which is addressed by MCA. For example:

(1) What has happened to the size of audiences reached over the period that MCA purports to evaluate?

(2) Is it meaningful on the issue here simply to compare network revenues per minute for 7:30 to 11:00 p.m. for

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1. ABC has indicated that it has benefited since the rule became effective. The rule relieved ABC of the difficulty of programming and selling the 7:30 to 8:00 p.m. time period, a time period that traditionally had been a very difficult one for ABC to cope with competitively. However, this effect is one which hardly approaches the effect attributed to the rule by the majors, particularly in the magnitude suggested by them.

a year prior to adoption of the rule with revenues per minute for 8:00 to 11:00 p.m. for years after the rule was adopted?

(3) Do Nielsen data for daytime advertising expenditures (unaffected by the prime time access rule) bear out the assumption made by MCA as to prime time?

(4) Are there changes in the patterns of sale of network prime time advertising which, apart from the rule, would tend to increase prices paid by advertisers?

(5) Are there any factors or trends in the economy generally or in the level of television advertising expenditures which, apart from the rule, would tend to increase prices paid by advertisers?

These questions are clearly relevant to an evaluation of the motion picture producers' argument, and the answers to these questions reveal that the argument is quite clearly fallacious. Thus:

(1) Advertisers generally pay for size and composition of audiences, not for minutes independent of these characteristics. In the period since November 1970 -- the base period selected by the majors -- the total number of television

households in the United States has increased from 60.1 million households to 66.2 million households,[1] an increase of 10.2 percent. All other things being equal, one would expect an increase in revenues per minute of about 10 percent as a result of this increase in television households, without regard to any rule.

In addition, actual viewing, based on Nielsen ratings -- ratings are a percentage of total television households -- also has increased over the period. Thus, Nielsen's quarter-hour audiences for each network's prime time programs broadcast from 7:30 to 11:00 p.m. have increased, on average, from 11,380,000 in November 1970 to 12,670,000 in November 1973, an increase of 11.3 percent.[2] Again, one would expect an increase in revenues per minute of more than 11 percent as a result of this increase in actual audience, wholly apart from any rule.

Thus, whatever the increase in network revenues per minute, logic would suggest that at least 11 percent of it is attributable to changes in the size of the actual viewing audience, measured by the same organization -- Nielsen -- that

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1. Nielsen base households.

2. This 11.3 percent increase is not in addition to the 10.2 percent increase in households. It includes the increase in households.

measures and publishes the revenues per minute relied upon by the majors.

(2) MCA has compared network revenues per minute for 7:30 to 11:00 p.m. in 1970-1971 with revenues which, though denominated 7:30 to 11:00 p.m., in fact are for 8:00 to 11:00 p.m. in subsequent years.[1] Obviously, any comparison of two years which includes in the base period, but not in the subsequent periods, revenues for 7:30 to 8:00 p.m. has a potential for statistical bias built into it. Similarly, the choice of any particular base period may influence the result because of reasons which are unique to the base period selected. Further, as we have shown, increasing size of audience must be considered.

The way to take most of these factors into account is to compare "cost per thousand" (CPM) figures for the same program hours from year to year. NBC has made such a comparison by extracting the 7:30 to 8:00 p.m. Nielsen data from the base period used by MCA and has compared the Nielsen data for the entire 1970-1971 season[2] with those for subsequent seasons in

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1. Except for Sunday night, when some network schedules have commenced at 7:30 and others at 8:00 p.m.

2. MCA's data is taken only from the November Nielsen report each year. It is offered in MCA's comments as representative for trend purposes of the entire year.

terms of cost per thousand homes reached. These data show that the CPM prime time (8:00 to 11:00 p.m.) increase since the 1970-1971 season, far from the 38 percent price increase projected by MCA, is about 22 percent,[1] and since the 1969-1970 season, is only about 15 percent.[2] Yet, since the 1970-1971 season, prices generally in the economy have increased by about 19 percent.[3]

(3) There has been an increase in daytime network revenues which, in general, is comparable to the increase in network prime time revenues. Since daytime revenues are not nearly as seasonally influenced as are prime time revenues, NBC has examined and averaged all of the Nielsen reports issued during each broadcast year for daytime[4] and for prime time. The results show that cost per thousand homes in daytime has increased by 16 percent from 1970-1971 to 1973-1974.[5] Thus, the trend in daytime advertising rates has, in general direction and to a substantial degree, paralleled the trend in prime time rates.

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1. From approximately $4.18 in 1970-1971 to $5.12 in 1973-1974.
2. From approximately $4.45 in 1969-1970 to $5.12 in 1973-1974.
3. See p. 11, n. 1, <u>supra</u>.
4. Monday through Friday, 10:00 a.m. to 5:00 p.m.
5. From approximately $1.56 in 1970-1971 to $1.81 in 1973-1974.

As an analytical matter, therefore, the daytime experience demonstrates that the generally similar trend in prime time rates cannot, to any significant extent, be causally connected with the prime time access rule.

(4) There have been changes in recent years in the patterns of sale of network prime time advertising which affect the demand and, hence, the price per minute obtained by networks wholly independent of the prime time access rule. For example, beginning in the late 1960's, a trend developed toward 30-second as distinguished from one-minute commercials. By virtue of this trend, two different advertisers could obtain exposure in a single commercial minute. This trend has been more pronounced in prime time than in daytime. While the use of 30-second announcements has tended to reduce the price per announcement, it has not tended to reduce the revenues per minute. The basic reason is that the availability of 30-second commercials at lower prices made prime time network television available to more, smaller advertisers. Similarly, there have been new types of advertisers who recently have utilized prime time network television for the first time as, for example, retail chain stores.

Although we know of no feasible way to quantify the effect of factors such as this on price, there can be no doubt

that they have operated to increase prices independent of the prime time access rule, and that they have been more significant in prime time than in daytime.

(5) General trends in the economy and the consequent effect on the level of advertisers' expenditures on television have had a major impact on rates to advertisers, again, wholly independent of the prime time access rule. Advertisers and networks do not exist in a separate economic world. They are part of the nation's economy. As we have noted, prices in the economy generally have increased by 19 percent from the 1970-1971 broadcast season to the 1973-1974 season. Over approximately the same period, gross national product has increased by 32.5 percent.[1] In this same period, advertisers' expenditures on all of television have risen 23.4 percent.[2] Ordinarily, and apart from any change in the amount of network time available for sale, one would expect that these general trends would work in the direction of increased prices.

Each of the factors we have discussed were omitted from the argument of the majors. Yet, each works in the

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1. From $977.1 billion in 1970 to $1,294.9 billion in 1973. Source: Department of Commerce.

2. FCC TV Broadcast Financial Data, 1973 (Table 1A). The network share of the total has not increased. Ibid.

direction of increased network prime time revenues from advertisers, quite apart from any changes effected by the prime time access rule. All are identifiable. Some are quantifiable,[1] at least for analytical purposes. And, in view of the general inflationary trend in the economy and of the level of advertisers' expenditures in television, a marked upward overall movement in recent years, both in prime time and in daytime, is hardly surprising.

These facts demonstrate that on a realistic basis any increase in rates that can be attributed to the prime time access rule is, at best, marginal.[2] Clearly, the assertions of the majors are not merely "speculative" but are wholly without substance.

B. Station Purchases of Syndicated Programming

A contention of the major motion picture producers is that network-owned stations determine what will be available

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1. See the first, second and third points, discussed at pp. 16-19, supra.

2. In showing that the majors' factual presentation is erroneous, we do not accept, and do not believe that the Commission should accept the majors' premise that it is part of the Commission's function to sit in a volatile market as arbiter of some fore-ordained balance of advantage as between buyers and sellers, whether of advertising time, network or local, or of programming, network or syndicated.

and what will succeed in syndication and that, therefore, networks dominate the syndication market. This contention is erroneous.

First, there is a large number of programs which obtain substantial exposure without significant or, in many cases, any purchases on network-owned stations. The evidence of this is overwhelming, in the current season as well as in prior seasons.

(1) Of the 18 access programs sold for the 1974-1975 season by NAITP members, seven were sold to no network-owned stations and two to only one network-owned station. Thus, half of the 18 programs were sold without any significant representation among the owned stations of the three networks.[1]

(2) NAITP also has provided a list of 14 additional first-run syndicated programs produced for 1974-1975 by non-NAITP members. Of these, six were purchased by only one network-owned station, another three were purchased by more than one network-owned station but not by more than one station owned by any one network.[2]

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1. See NAITP Comments, pp. 48-49.

2. Id., p. 48.

(3) Of 30 different access programs listed for the Fall 1974-1975 season, Monday through Friday (as reflected in Exhibit G to Comments of Sandy Frank Program Sales, Inc.), eleven were not scheduled on any network-owned station and six were scheduled on only one or two network-owned stations. Thus, over half of the programs were scheduled on fewer than three network-owned stations.

(4) Of the 28 leading access programs sold in ten or more markets for access periods in the top 50 markets for the Fall 1974,[1] nine were not scheduled on any network-owned stations and six were scheduled on fewer than three network-owned stations.[2]

(5) Of the 35 leading[3] syndicated access programs in the 1972-1973 broadcast season, as reported in Nielsen's report on syndicated programs, 16 were carried by no network-

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1. See Exhibit B to Comments of Sandy Frank Program Sales, Inc. (list is as of July 1, 1974). Source: Broadcasting, July 15, 1974, p. 21.

2. The average number of top 50 markets in which these fifteen programs were scheduled in access periods was 28 and the average number of all markets in which these programs were scheduled was 105.

3. Based on the numbers of markets in which programs were carried. NSI, Report on Syndicated Programs, February, March 1973.

owned station, by only one or two network-owned stations.[1] The leading two programs were not carried by any network-owned station, and, overall, five of the top ten programs were carried by none, or by only one or two network-owned stations.

(6) Of the 35 leading syndicated access programs in the 1973-1974 broadcast season, 23 were carried by no network-owned station, or by only one or two network-owned stations.[2] The first and third-ranked programs were not carried by any network-owned station, and, overall, six of the top ten programs were carried by none, or by only one or two network-owned stations.

(7) Of the 35 leading first-run syndicated access programs in the 1972-1973 broadcast season, 18 returned and were among the 35 leading access programs in the 1973-1974 broadcast season. Of these 18 returning programs, nine had been carried by three or more network-owned stations in 1972-1973, and nine were not carried by any network-owned station,

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1. Ten were not carried by any, five were carried by one each, and one was carried by two network-owned stations. The list is attached as Exhibit 1.

2. Fourteen were not carried by any, seven were carried by one each, and two were carried by two network-owned stations. NSI, Report on Syndicated Programs, February, March 1974. The list is attached as Exhibit 2.

or were carried by only one or two network-owned stations[1] in 1972-1973.

(8) Of the 35 leading first-run syndicated access programs in the 1973-1974 broadcast season, 17 returned for the 1974-1975 season.[2] Of these 17, eight had been carried by three or more network-owned stations in 1973-1974, and nine were not carried by any network-owned station, or were carried by only one or two network-owned stations[3] in 1973-1974.

These facts, from a variety of sources, confirm that network-owned stations are not the critical decision makers as to the success or failure of syndicated programs. Obviously, it is helpful to any syndicator to make a single sale to a group of stations, whether or not network-owned,[4] but such group purchases neither assure success nor are they the only means to success. The data establish these facts.

Second, purchases by network-owned stations are not determinative of whether access programming will be carried

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1. Six were not carried by any network-owned station, two by one station each, and one by two stations.

2. As reflected in Broadcasting, p. 21 (July 21, 1974).

3. Four were not carried by any network-owned station, four by one station each, and one by two stations.

4. Twenty-two companies own three or more stations in the top 50 markets.

or will succeed, because in each market in which any network owns any station there is a substantial number of non-network-owned television stations. These stations obviously provide alternatives for program suppliers who are not successful in selling their product to a particular network's owned stations.[1] Thus:

(1) In each market in which NBC owns a television station, there are from four to seven additional commercial television stations in operation.[2] Overall, there are 32 commercial television stations in operation in the five markets in which NBC has stations. In every one of the five markets, there are at least three commercial television stations not owned by any network. In every market except Chicago, there are at least two VHF stations not owned by any network. And in Chicago, there is one non-network-owned VHF station and two non-network-owned UHF stations.[3]

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1. See Comments of Sandy Frank Program Sales, Inc., pp. 104-105, para. 115.

2. As reported by ARB sweep surveys for November 1973, February, March 1974, and May 1974, all educational television stations and foreign-language stations have been eliminated from the count.

3. The numbers of non-network-owned stations (excluding foreign-language and educational stations) serving each of the markets are as follows: New York, 4 stations (3 VHF and 1 UHF); Los Angeles, 5 stations (4 VHF and 1 UHF); Chicago, 3 stations (1 VHF and 2 UHF); Cleveland, 5 stations (2 VHF and 3 UHF); Washington, 4 stations (3 VHF and 1 UHF).

(2) This same pattern of choices for syndicators also exists in the markets in which ABC or CBS owns television stations. Thus, in each of the markets in which CBS or ABC owns stations, there are from three to five non-network-owned stations. Overall, there are 32 commercial television stations serving the five markets in which CBS owns stations, and 33 commercial television stations serving the five markets in which ABC owns television stations.

As a practical matter, this means that in every market distributors of first-run syndicated programming have a number of alternatives to any network-owned station. If a distributor cannot interest one station or group of stations, he can try the others. The record shows that distributors in fact use these alternatives and that they are successful. The attempt, therefore, to make it seem as if network-owned stations determine what succeeds in syndication is simply wrong, both in concept and in fact.

C. Network Program Production and Program Choices Available to the Public

There are two other points that have arisen from time to time in the course of these proceedings that warrant comment. The first is the notion that the viewing public in the larger markets in the country somehow does not have a

large range of program choices available to it. The second is the notion that networks produce a substantial portion of the entertainment programming included in network prime time schedules. Neither notion is correct.

In order to determine the number of program choices and the extent of network-produced entertainment programs available in the top 50 markets, we have examined a recent week's program schedule for every commercial television station on the air in the top 50 markets.[1] In total, there were 231 such stations, of which 74 were not affiliated with any network. We also have compared the schedule of programs offered by each of the networks in this same period. On the assumption that all network programming was carried by every affiliate, we found that:

(1) Each network's total schedule of entertainment programs represents only about 12 percent of the total programming available on commercial television stations in the top 50 markets. By contrast, more than fifty percent of the programming was non-network, either syndicated or local.

(2) In the hours between 6:00 and 11:00 p.m., each network's total programming, including news, public affairs

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1. Programs based on TV Guide. Stations based on ARB's listings of stations grouped by market as appearing in 1974 Broadcasting Yearbook, pp. 16-39.

and sports as well as entertainment programming, represents only about 16 percent of the total program choices available on commercial television in the top 50 markets. Again, more than 50 percent of the programming was non-network.

(3) Less than 10 percent of network prime time entertainment programming is produced by the networks; more than 90 percent is produced by independent suppliers.[1]

(4) In the hours between 6:00 and 11:00 p.m. (or 7:00 and 11:00 p.m.), each network's own entertainment program production represents less than two percent of the total programming available on commercial television stations in the top 50 markets.

(5) The total amount of prime time entertainment programming produced by the three networks in the aggregate represents only about 5 percent of the prime time programming available on commercial television stations in these markets.

These facts clearly demonstrate that there are indeed a variety of program choices available to the American public, and that a large number of them exists apart from

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1. Warner Brothers asserts that network-produced prime time entertainment programming has increased since the adoption of the prime time access rule (Comments of Warner Brothers, p. 20). This is incorrect. See p. 2, _supra_.

programs offered by networks. Network-produced programs represent only a very small part of the program choices now available to the American public.

Conclusion

In these reply comments, we have presented the facts which demonstrate conclusively that the arguments advanced by the major motion picture producers as to so-called network "dominance" flowing from the prime time access rule are without substance. On the basis of these facts, we believe that the Commission should now reaffirm its original conclusion rejecting these arguments.

The American public now has a variety of program choices available to it. There is nothing in the prime time access rule that impairs those choices. Nor is there anything in the operation of the television networks that impairs those choices.

Accordingly, we urge that the Commission move expeditiously to bring these proceedings, and the uncertainty they have generated, to an end. As has been suggested by

others, a period of stability with respect to the operation of the rule is not only desirable but is warranted.

Respectfully submitted,

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EXHIBIT 1

TOP 35 FIRST-RUN
SYNDICATED ACCESS PROGRAMS
1972-1973

		Number of Stations Carrying Program	
		Total	Network-Owned
1.	Lawrence Welk	176	0
2.	Hee Haw	168	0
3.	Let's Make a Deal	123	6
4.	Truth or Consequences	121	2
5.	Police Surgeon	120	6
6.	To Tell the Truth	114	3
7.	Hollywood Squares	111	5
8.	Nashville Music	106	0
9.	Parent Game	103	4
10.	This Is Your Life	100	0
11.	U.F.O.	93	3
12.	Bobby Goldsboro	88	0
13.	Protectors	85	5
14.	Price Is Right	79	6
15.	Young Dr. Kildare	68	3
16.	Circus	66	5
17.	Adventurer	65	5
18.	What's My Line	56	1
19.	Mancini Generation	53	0

		Total	Network-Owned
20.	Stand Up & Cheer	52	4
21.	World of Survival	50	5
22.	Wait 'til Your Father Gets Home	50	7
23.	Buck Owens	47	0
24.	I've Got A Secret	46	3
25.	Jonathan Winters	41	1
26.	Black Beauty	41	1
27.	Golddiggers	33	4
28.	Mouse Factory	30	5
29.	Amazing World of Kreskin	29	0
30.	Safari to Adventure	28	1
31.	Beat the Clock	26	1
32.	You Asked For It	21	0
33.	1/2 George Kirby Hour	18	3
34.	Thrill Seekers	18	4
35.	Evil Touch	17	0

Source: Nielsen Station Index, Report on Syndicated Programs, February-March 1973. Programs are ranked according to the number of markets in which each program was carried.

EXHIBIT 2

TOP 35 FIRST-RUN SYNDICATED ACCESS PROGRAMS 1973-1974

		Number of Stations Carrying Program: Total	Network-Owned
1.	Lawrence Welk	179	0
2.	Wild Kingdom	175	7
3.	Hee Haw	172	0
4.	Untamed World	130	1
5.	Let's Make a Deal	123	6
6.	To Tell the Truth	123	1
7.	Truth or Consequences	121	1
8.	Police Surgeon	120	6
9.	Hollywood Squares	118	7
10.	Nashville Music	118	0
11.	Bobby Goldsboro	114	1
12.	Price Is Right	109	6
13.	New Zoo Revue	102	0
14.	Ozzie's Girls	80	5
15.	Porter Wagoner	78	0
16.	Dusty's Trail	74	1
17.	Jimmy Dean	69	0
18.	Jonathan Winters	57	3
19.	New Treasure Hunt	55	5
20.	What's My Line	55	0

		Total	Network-Owned
21.	Wild World of Animals	55	2
22.	Animal World	50	3
23.	Stand Up & Cheer	50	3
24.	This Week In NBA	50	0
25.	National Geographic	48	0
26.	Buck Owens	39	0
27.	Orson Welles	39	6
28.	Thrillseekers	37	1
29.	Wait 'til Your Father Gets Home	37	4
30.	Celebrity Bowling	35	0
31.	Concentration	34	1
32.	Beat the Clock	33	0
33.	Great Sports Legends	32	2
34.	Night Gallery	28	0
35.	Circus	[illegible]	0

Source: Nielsen Station Index, Report on Syndicated Programs, February-March 1974. Programs are ranked according to the number of markets in which each program was carried.